84-1458

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ALEXANDER L. STEVAS,
CLERK

NO.

in the Supreme Court of the United States

October Term, 1984

ALAN CHESLER and SHEILA CHESLER,
Appellants,

vs.

STADLER ASSOCIATES, INC.,
Appellee.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ALLAN H. APPLESTEIN, Esquire
Attorney for Appellants
7600 Red Road
South Miami, Florida 33143
Telephone: (305) 666-5957

QUESTIONS PRESENTED

I.

WHETHER THE CONDUCT OF THE SELLING BROKER AMOUNTED TO A WAIVER OF HER RIGHT TO A COMMISSION UPON DEFAULT UNDER THE PURCHASE AND SALE AGREEMENT.

II.

WHETHER THE LISTING BROKER WAS AN AGENT OF THE SELLING BROKER FOR PURPOSES OF SIGNING THE AGREEMENT WHICH WAIVED THE REAL ESTATE COMMISSION AND WHETHER THE SIGNING OF THAT AGREEMENT WAS WITHIN HER AUTHORITY AS SUCH AGENT.

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CITATION TO THE OPINION BELOW

This Petition relates to the opinion of the United States Court of Appeals for the Eleventh Circuit, attached hereto.

JURISDICTION

The attached Judgment was entered on February 11, 1985, with no rehearing requested. Jurisdiction is conferred upon this Court by 28 U.S.C.A. §1254.

STATEMENT OF THE CASE

This is a case involving a contract for the sale and purchase of real property. On February 24, 1980, Plaintiff, EMPIRE CORPORATION, agreed to purchase real property located at 6520 S.W. 114th Street in Miami, Florida, from the Defendants, ALAN CHESLER and SHEILA CHESLER (Record, Page 9). The purchase price was $535,000.00 and Plaintiff made a deposit under the contract of $53,500.00. The listing broker for the contract was Defendant, Stadler Associates, Inc. Contemporaneously with the aforesaid Purchase and Sale Contract, Defendants, SHEILA CHESLER and ALAN CHESLER and Defendant, South Dade Realty, Inc. by its agent, Joan Grady, signed a handwritten addendum to the contract providing that the real estate commission would be waived in the event the purchaser breached the contract and forfeited the deposit (Record, Page 243). Plaintiff, EMPIRE CORPORATION, did not close under the aforesaid Purchase and Sale Agreement.

On June 20, 1980, Plaintiff, EMPIRE CORPORATION, filed suit in the United States District

Court for the Southern District of Florida suing Defendant sellers, ALAN CHESLER and SHEILA CHESLER, Defendant brokers, South Dade Realty, Inc., and Stadler Associates, Inc., and Defendant escrow agent, Bank of Florida, requesting rescission, return of the deposit, and damages. (Record, Page 1). The Complaint alleged misrepresentations by Defendants concerning square footage and also failure to deliver an abstract, which allegations would have excused Plaintiff's failure to perform and close. Subsequently, crossclaims were filed between the Defendants concerning entitlement to the deposit in the event of Plaintiff's default. Plaintiff's Complaint was dismissed on April 14, 1983, for failure to assert the proper party Plaintiff and to comply with the Court's Order to Compel Discovery (Record, Page 198). Trial was then held between the remaining Defendants as to entitlement to the deposit.

Pursuant to the aforesaid contract for Purchase and Sale, sellers/Defendants, ALAN CHESLER and SHEILA CHESLER, were entitled to one-half of the deposit upon buyer's default. The issue was whether Defendants, CHESLER, were entitled to the remaining half of the deposit which would otherwise have gone to the brokers, as a result of the handwritten addendum to the Contract, (copy attached).

Trial was held before the Honorable Joe Eaton on April 11, 1984. The court entered a Final Judgment on June 27, 1984, (Record, Page 279), (copy attached). The Final Judgment provided that Defendants, ALAN CHESLER and SHEILA CHESLER, were entitled to an additional 25% of the deposit, that 25% representing the broker commission which would otherwise have gone to Defendant, South Dade Realty, Inc. The court

then ruled that the remaining 25% of the deposit would go to Defendant, Stadler Associates, Inc. and not Defendants, SHEILA CHESLER and ALAN CHESLER. Defendants, ALAN CHESLER and SHEILA CHESLER, filed a Notice of Appeal on July 16, 1984, appealing the portion of the Final Judgment awarding 25% of the deposit to Defendant, Stadler Associates, Inc. (Record, Page 281).

The issue for review is first whether the trial judge erred in applying the law as to whether Roaslie Elliott's failure to speak out constituted a waiver of her commission, and second, whether the trial judge erred in his legal conclusion that an agency was not established between the selling and listing brokers, or that such agency did not encompass the authority to sign the commission waiver agreement.

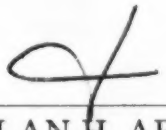
The basis for federal jurisdiction of this case in the United States District Court was diversity.

The reason for allowance of the Writ is that this case involves an important legal question and a factual decision which is clearly erroneous.

The copy of the original Judgment of the United States District Court is attached hereto.

CERTIFICATE OF SERVICE

I CERTIFY that copy hereof has been served by mail upon LAURA L. RUSSO, Attorney for Appellee, this 6 day of March, 1985.



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Appendix

[FILED JUN 27 1984]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 80-1630-Civ-JE

EMPIRE CORPORATION

Plaintiff,

vs.

ALAN CHESLER, et al.,

Defendants.

FINAL JUDGMENT

THIS ACTION came on for trial on April 11, 1984 before the Court, Honorable Joe Eaton, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered, and a hearing on the parties' Motions to Tax Attorney's Fees having been held on June 19, 1984,

IT IS ORDERED AND ADJUDGED:

1. The Court hereby adopts and incorporates the findings of fact and conclusions of law announced by the Court at the trial of this case on April 11, 1984, and the record thereof is made a part of this judgment.

2. That as to the Cross-Claim by South Dade Realty, Inc. to 25% of the deposit at issue in this cause,

said claim be and the same is hereby denied and the Cross/Plaintiff South Dade Realty, Inc. take nothing, that the Cross-claim of South Dade Realty, Inc. be dismissed on the merits and that the Cross/Defendants ALAN CHESLER and SHEILA CHESLER recover from the Cross/Plaintiff South Dade Realty, Inc. their costs of this action including an attorney's fees in the amount of $2,750.00.

3. That as to the Cross-Claim of Stadler Associates, Inc. to 25% of the deposit at issue in this cause, that the Cross/Plaintiff Stadler Associates, Inc. recover on its Cross-Claim a sum equal to 25% of the initial deposit at issue in this case plus the interest accrued thereon and recover from the Cross-Defendants SHEILA and ALAN CHESLER the costs of its action including an attorney's fee in the amount of $3,500.00.

4. That ALAN CHESLER and SHEILA CHESLER recover on their Cross-Claim a sum equal to 75% of the initial deposit at issue in this case plus the interest accrued thereon.

DONE and ORDERED in Chambers, Miami, Dade County, Florida, this 27 of June, 1984.

/s/ Joe Eaton

U.S. DISTRICT COURT JUDGE

cc: Lawrence R. Metsch, Esquire
Stephen H. Broudy, Esquire
Rex E. Russo, Esquire
Richard E. Reckson, Esquire
Bruce Charles King, Esquire
Jeffrey Allen Tew, Esquire

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5541
Non-Argument Calendar

EMPIRE CONSTRUCTION,
Plaintiff-Counter-Claim Defendant,

versus

ALAN CHESLER and SHEILA CHESLER,

Defendants-Cross-Claim
Defendants-Counter-Claim
Plaintiffs-Appellants,

SOUTH DADE REALTY, INC.,
Defendant-Cross-Claim Plaintiff,

STADLER ASSOCIATES, INC.,

Defendant-Cross-Claim
Plaintiff-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(February 11, 1985)

Before RONEY, FAY and JOHNSON, Circuit Judges.

PER CURIAM:

~~The~~ controlling issues in this case pose questions of fact: (1) did the selling broker by her actions waive the right to a commission; and (2) did the listing broker's waiver constitute a waiver of the selling broker's commission? Either of these questions could probably have been answered in the affirmative by the trier of fact without being clearly erroneous. The record does not compel an affirmative answer, however, and the trial judge's decision to the contrary is not clearly erroneous on the record before this Cout.

Therefore, the judgment of the district court is due to be affirmed without opinion under our Circuit Rule 25.

AFFIRMED.

On this 24th day of February, 1982, it is agreed by Joan Grady, both individually & as agent for Smith Grady Realty Co, that in consideration for Sheila Chesler executing an oblivious unacceptable contract offer of even date, to buyers corporation, to assign any & all of the rights & duties to deposit (in event of forfeiture by Buyer) to said Sheila Chesler and Alan Chesler jtly.

Witness
Sherry Chesler

Joan M Grady
Joan Grady

Sheila Chesler

Smith Grady Realty
by Joan M Grady
Joan Grady Agent

BEST AVAILABLE COPY

Dft Chesler's Comm
SO 4/21/80

STANDARD SALES CONTRACT FORM – CORAL GABLES BOARD OF REALTORS

THIS IS A LEGALLY BINDING CONTRACT FOR SALE AND PURCHASE

REALTOR

PARTIES: ALAN CHESLER and SHEILA CHESLER, as SELLER

and EMPIRE CORPORATION AND/OR ASSIGNS, as BUYER

hereby agree that Seller shall sell and Buyer shall buy the following real property upon the terms and conditions set forth below and on the reverse side hereof.

I. LEGAL DESCRIPTION: Lot 7, Block 1, HAMMOCK PINES ESTATES, according to to the plat thereof, Plat Book 84, Page 84, of the Public Records of Dade County, Florida, together with the improvements situate thereon. Also included are all built-in fixtures & equipment located with and about said improvements, wall-to-wall carpeting, window treatments, range, refrigerator-freezer, dishwasher, washer & dryer, security system. Exclude: light fixture in foyer, needlepoint carpet in child's bedroom.
(If personal property is being sold, items shall be detailed above or detailed inventory shall be attached.)

II. STREET ADDRESS: 6520 S. W. 114th Street, Miami, Florida 33156

III. PURCHASE PRICE AND METHOD OF PAYMENT: $ 535,000.00
The sum of $ 1,000.00 is herein deposited with Stadler Associates, Inc. Escrow Account

Purchaser shall increase the deposit to a total of 10% of the purchase price by March 1, 1980

Purchaser shall assume existing mortgage with Citizen's Federal, which mortgage has a balance of approximately $62,173 at an interest rate of 7% per annum, payable $857 Monthly including amortization of principal and interest, plus escrow for estimated taxes and insurance.

Balance in cash at closing, of which the deposits above referred to shall be a part.

IV. TIME FOR ACCEPTANCE: If this contract is not executed by both parties hereto on or before Feb. 25, 1980 any funds deposited in escrow by Buyer shall, at the option of Buyer, be returned to him and this offer shall thereafter be null and void. The date of contract shall be the date when the last one of the Seller or Buyer has signed this contract.

V. EVIDENCE OF TITLE: Within 60 days from the date of this contract, Seller shall at his expense deliver to Buyer or his attorney an abstract of title in accordance with Standard A on reverse side.

VI. CLOSING DATE: This transaction shall be closed on or before July 2, 1980 and is controlled by other provisions of this contract.

VII. PRORATIONS AND ESCROW BALANCE: Taxes, mortgage guarantee insurance, interest, rents and other expenses and revenue of said property shall be prorated as of midnight of the day preceding date of closing. Seller shall receive as credit at closing an amount equal to the escrow funds held by the mortgagee, which funds shall thereupon be transferred to Buyer.

VIII. CONVEYANCE: Seller shall convey title to the real property to Buyer by Statutory Warranty Deed free and clear of all encumbrances, liens, easements, taxes, assessments, mortgages, mechanics, petroleum and road rights-of-way, whether in favor of an individual or governmental unit, but subject to matters contained in paragraph IX following. Personal property shall be conveyed by absolute bill of sale.

IX. RESTRICTIONS AND EASEMENTS: Buyer shall take title subject to (a) Zoning, restrictions imposed by governmental authority, (b) Restrictions and matters appearing on the plat or otherwise common to the subdivision, (c) Public utility easements of record, provided said easements are located on the side or rear lines of property, (d) Taxes for year of closing, assumed mortgages and purchase money mortgages, if any, (e) Other
Seller warrants that, at the time of closing, there shall be no violation of building or zoning codes.

X. ESCROW CLOSING: The cash proceeds of sale shall be held in escrow by Seller's attorney for not more than 5 business days to allow deed to be recorded and abstract continued at expense of Buyer, to show title in Buyer free of intervening title objections attributable to Seller from date of last continuation. If Buyer's attorney shall fail to notify Seller's attorney within such period of any such objections, Buyer will be deemed to have accepted the title as is. Buyer shall be entitled to possession of the premises upon delivery of the escrow funds to Seller. If a portion of the purchase price is to be derived from institutional financing, the requirements of such institution as to place, time, and procedures for closing and for disbursement of mortgage proceeds shall control, anything in this Contract to the contrary notwithstanding.

XI. TYPEWRITTEN OR HANDWRITTEN PROVISIONS: Typewritten or handwritten provisions inserted in this form or attached hereto as Addenda shall control all printed provisions in conflict therewith. No agreements or representations unless incorporated in this contract shall be binding upon any of the parties hereto.

XII. SPECIAL CLAUSES:

WITNESSES: (Two are required)
Rosalie H. Elliott

Executed by Buyer on the 24th day of February, 19 80
(SEAL)
(SEAL)

WITNESSES: (Two are required)

Executed by Seller on the 20th day of Feb., 19 80
(SEAL)
(SEAL)

Deposit received on February 24, 1980 subject to the conditions of this contract, if check subject to collection.

By Stadler Associates, Inc.
(Broker (Type or Print))

By Rosalie H. Elliott
(Escrow Agent)

BEST AV

STA[illegible]ARDS FOR REAL ESTATE TRANSACTION[illegible]

A. **EVIDENCE OF TITLE**: Seller shall provide a complete abstract of title brought current by an existing abstract firm (if not existing, then certified as correct by an existing firm) purporting to be an accurate compilation of the instruments affecting the title to subject real property recorded in the public records of the county to the date of this contract showing in Seller a marketable and insurable title in accordance with the standards adopted from time to time by the Florida Bar subject only to: taxes; conditions; restrictions or qualifications set forth in this contract and those which shall be discharged by Seller at or before closing. Upon the closing of the transaction, such abstract shall become the property of Buyer but may be required by the mortgagee until all outstanding mortgages are fully paid. Buyer shall have 10 days from the date of receiving the abstract to examine same. If title is found to be defective, Buyer shall notify Seller in writing specifying the defects. If said defects render the title unmarketable, Seller shall have 120 days from receipt of such notice to cure the defects, and if after said period Seller shall not have cured the defects, Buyer shall have the option of either (1) accepting the title as it then is or (2) demanding a refund of all moneys paid hereunder which shall forthwith be returned to Buyer and thereupon Buyer and Seller shall be released of all further obligations hereunder. Seller agrees that he will, if title is found to be unmarketable, use diligent effort to correct the defects in the title within the time herein provided therefor including the bringing of any suits, if necessary.

B. **EXISTING MORTGAGES**: Seller shall obtain and furnish a statement from the mortgagee setting forth the principal balance, method of payment, interest rate, and whether the mortgage is in good standing. If there is a charge for the change of ownership records by the mortgagee, it shall be borne equally by the parties. If the mortgagee does not accept Buyer for purposes of assuming the existing mortgage, where the mortgage instrument requires such acceptance, or if mortgagee increases the rate of interest, Buyer at his option may cancel the contract and all moneys paid on the purchase price shall be refunded to him.

C. **PURCHASE MONEY MORTGAGES**: A purchase money mortgage shall provide for mortgagee against loss by fire with extended coverage in an amount not less than the total outstanding mortgage balances or 80% of the insurable value, whichever is greater, in a first mortgage, the note and mortgage shall provide for acceleration, at the option of the holder, after 30 days default and in a second mortgage after 15 days default. Second mortgage shall require the owner of the property encumbered by said mortgage to keep all prior to and encumbrances in good standing and forbid the owner of the property from accepting modification of, or future advances under a prior mortgage. Buyer shall have the right to prepay all or any part of the principal at any time or times with interest to date of payment without penalty, unless otherwise provided for in Paragraph III hereof.

D. **SURVEY**: Buyer, within the time allowed for delivery of abstract and examination thereof, may have said property surveyed at his expense. If the survey shows any encroachment on said property or that the improvements presumed to be located on the subject property in fact encroach on the lands of others, or violate any of the covenants herein, the same shall be treated as a title defect.

E. **TERMITE INSPECTION**: At least ten days prior to closing at Buyer's expense, Buyer shall have the right to obtain a written report from a licensed exterminator stating that there is no evidence of live termite or other wood boring insect infestation on said property nor substantial damage from prior infestation on said property. If there is such evidence, Seller shall pay up to one percent (1%) of the purchase price for the treatment required to remedy such infestation, including repairing and replacing of portions of said improvements which have been damaged. However, if the cost for such treatment or repairs exceed one percent (1%) of purchase price, Buyer may elect to pay such excess. If Buyer elects not to pay, Seller may pay the excess or cancel the contract.

F. **ROOF INSPECTION**: At least ten days prior to closing at Buyer's expense, Buyer shall have the right to obtain a written report from a licensed roofer stating that the roof is in a watertight condition. In the event repairs are required either to correct leaks or to replace damage to facia or soffit, Seller shall pay up to two percent (2%) of the purchase price for said repairs which shall be performed by a licensed roofing contractor. However, if the cost for such repairs exceed two percent (2%) of purchase price, Buyer may elect to pay such excess. If Buyer elects not to pay, Seller may pay the excess or cancel the contract.

G. **INSURANCE**: The premium on any hazard insurance policy in force covering improvements on subject property shall be prorated between the parties of the policy may be cancelled at Buyer's option. If insurance is to be prorated, Seller shall on or before closing date furnish to Buyer all insurance policies or copies thereof.

H. **LEASES**: Seller shall furnish copies of all written leases to Buyer within 7 days after date of contract and if there are any persons in possession without a written lease, or subject to the terms such persons specifying the nature and duration of the occupancy shall be furnished Buyer by Seller prior to the closing date.

I. **MECHANICS LIENS**: Seller shall furnish to Buyer at time of closing an affidavit attesting to the absence of any claims of lien or potential lienors known to Seller.

J. **EXPENSES**: State, utility and documentary stamps and the cost of recording any corrective instruments shall be paid by Seller. Documentary stamps to be affixed to the note secured by the purchase money mortgage, intangible tax on the mortgage and the cost of recording the deed and purchase money mortgage shall be paid by the Buyer.

K. **PRORATION OF TAXES**: Taxes shall be prorated based on the current year's tax with due allowance being made for the maximum discount and for homestead or other exemptions if allowed for said year. If the closing occurs at a date when the current year's assessment is not fixed, but the current year's assessment is available, taxes will be prorated based upon such assessment and the prorations will be adjusted upon receipt of the subject property's tax bill for the year of closing, which adjustments will survive the closing. If current year's assessment is not available, then taxes will be prorated on the prior year's tax, provided however, if there is an error or omission with respect to the subject property's tax bill for the year of closing, which omission or error results in a higher tax bill for the prior year, taxes shall be prorated on the basis of such higher tax. Any such subsequent proration based upon a higher tax bill shall survive the closing. Any tax exemption which may be claimed by the Seller for the year of closing shall be prorated between the parties. However, any tax exemption which may be claimed by the Seller for the year subsequent to the year of closing shall not be prorated but shall be the property of the Seller. Taxes shall be prorated based upon the discount which would be allowed if payment is made in full on or before November 30th of the year of closing.

L. **SPECIAL ASSESSMENT LIENS**: Certified, confirmed and ratified special assessment liens as of the date of closing are to be paid by Seller. Pending liens as of the date of closing shall be assumed by Buyer, provided however that where the improvement has been substantially completed as of the date of the contract, such pending liens shall be considered as certified, confirmed and ratified and Seller shall at closing be charged an amount equal to the last estimate by the public body of the assessment for such improvement.

M. **OTHER INSPECTIONS**: Not later than 15 days prior to closing Buyer may inspect all appliances, air conditioning, heating systems, electrical systems, plumbing, machinery, sprinklers and pool mechanical equipment, included in the sale. Seller shall pay for necessary repairs to place such items in working order at time of closing.

N. **RISK OF LOSS**: If the improvements are damaged by fire or other casualty prior to time of delivery of the deed and can be restored to substantially the same condition as now existing within a period not to exceed 60 days thereafter, Seller may restore the improvements and the closing date and date of delivery of possession hereunder (or pro-rata thereof) shall be extended accordingly. If Seller fails to do so, Buyer shall have the option of (1) taking the property as is, together with the insurance proceeds, if any, or (2) canceling this contract and all deposits shall be forthwith returned to Buyer and the parties released of any further liability hereunder.

O. **MAINTENANCE**: Between the date of the contract and the date of closing, the property, including lawn, shrubbery and pool, if any, shall be maintained by Seller in the condition [illegible] as of the date of the contract, ordinary wear and tear excepted.

P. **ATTORNEY FEES AND COSTS**: In connection with any litigation arising out of this contract, the prevailing party shall be entitled to recover all costs incurred, including reasonable attorney's fees.

Q. **DEFAULT**: If Buyer fails to perform this contract within the time specified, the deposit paid by Buyer may be retained by or for the account of Seller as consideration for the execution of this agreement and in full settlement of any claims for damages, and all parties shall be relieved of all obligations under this contract or offer, at the option Seller may proceed at law or in equity to enforce his legal rights under this contract. If, for any reason other than failure of Seller to render his title marketable after diligent effort, Seller fails, neglects or refuses to perform this contract, Buyer may receive the return of his deposit or may proceed in law or in equity to enforce his legal rights under this contract.

R. **PERSONS BOUND**: The benefits and obligations of the contract shall inure to and bind the respective heirs, personal representatives, successors and assigns of the parties hereto. Wherever used, the singular shall include the plural, the plural the singular, and the use of any gender shall include all genders.

S. **SPECIAL COVENANTS**: Seller represents and warrants (1) that there is ingress and egress to said property over public roads, and (2) that there are no parties in possession other than Seller unless otherwise specified above.

FEE TO BROKER: Seller agrees to pay to the real estate broker named herein as the broker for the purchase and sale of subject property, a fee equal to 6 % of the gross purchase price at the time of closing this transaction. If Buyer fails to perform and the deposit is retained, the amount of such deposit shall be divided equally between the broker and Seller, provided, however, that the amount to be retained or received by the broker shall not exceed the full amount of the fee which otherwise would have been earned by the broker and agreed upon herein to be paid by Seller. If the transaction shall not be closed because of inability of or inability to perform of Seller, Seller shall pay the fee in full to the broker on demand.

[illegible] (Seal) Broker

Stadler Associates, Inc. in 50/50 co-op wit
South Dade Realty, Inc.

[illegible]

ILABLE COPY